Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

80-1551

No.

Supreme Court of the United States

October Term, 1980

IN THE MATTER OF THE APPLICATION

OF

FRANK GODERRE,

Petitioner,

against

CITY OF PEEKSKILL, JOHN E. WALSH, City Manager and Commissioner of Public Safety, and CITY OF PEEKSKILL POLICE DEPARTMENT, WALTER J. JONES, Police Commissioner,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

PETITION FOR CERTIORARI

RICHARD HARTMAN
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300 Old Country Road
Mineola, N. Y. 11501
(516) 742-9000

Questions Presented.

May a public employee be discharged, consistent with the Fourteenth Amendment, solely due to his having been found liable to a third party along with the respondents herein for false arrest based on that public employee's performance of duty as a police officer in executing a warrant issued by another municipality and executed upon the direction of the respondents?

Does Section 75 of the New York State Civil Service Law, as interpreted by the New York State Court of Appeals, adequately safeguard the procedural due process rights guaranteed to citizens by the Fourteenth Amendment of the Constitution of the United States?

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980.

No._____

IN THE MATTER

of

The Application of FRANK GODERRE,

Petitioner,

against

CITY OF PEEKSKILL, JOHN E. WALSH, City Manager and Commissioner of Public Safety, and CITY OF PEEKSKILL POLICE DEPARTMENT, WALTER J. JONES, Police Commissioner,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

PETITION FOR CERTIORARI.

Petitioner Frank Goderre respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of New York entered in this case on December 16, 1980.

Opinions Below.

The opinion of the New York Court of Appeals is reproduced in the Appendix hereto (at pp. 1a-2a, *infra*) and is reported at____N. Y. 2d____, ____N. Y. S. 2d____, ___N. E. 2d____. The memorandum opinion of the New York Supreme Court, Appellate Division, Second Department, is reproduced at pages 3a to 9a, *infra,* and is reported at 71 A. D. 2d 892, 419 N. Y. S. 2d 631. The determination and decision of the respondents is reproduced at pages 10a to 17a, *infra,* and is unreported.

Jurisdiction.

The opinion and judgment of the New York Court of Appeals issued on December 16, 1980. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) and §1257(3).

Relevant Regulations and Constitutional Provisions.

Duties and Rules of Conduct, Police Department, City of Peekskill, Articles 12.11, 12.15 and 12.19; Section 75 of the New York State Civil Service Law and the Fourteenth Amendment to the Constitution of the United States, the relevant provisions in this case are reproduced at pages 18a-19a.

Statement of the Case.

The petitioner herein was a police officer employed by the City of Peekskill (respondents) on or about the 13th day of April, 1973. That until the 9th day of August, 1978, the petitioner was never the subject of a disciplinary hearing in the City of Peekskill and to the best of his knowledge was satisfactorily performing his duties as a police officer within the City of Peekskill.

That on or about the 27th day of August, 1977, the petitioner arrested a citizen of the City of Peekskill on an arrest warrant issued by Suffolk County and executed that warrant in the presence of other officers. Upon the return by petitioner and his brother police officers to the Police Headquarters maintained by the respondents, it was discovered that the individual who was arrested was not the subject of the Suffolk County warrant and he was released.

That the individual who was arrested pursuant to that warrant commenced a tort action against the respondents and petitioner for false arrest. The plaintiff in that proceeding succeeded in obtaining a judgment against the petitioner and the respondents.

The City of Peekskill afforded the petitioner full representation in that proceeding brought by Pedro Juan Rivera against the City of Peekskill and Frank Goderre and, in fact, on the 18th day of October, 1977, affirmatively found that the petitioner herein had acted properly and with "probable cause" in arresting Pedro Juan Rivera and directed the defense of the petitioner herein.

The Appellate Division, Second Department, in its order granting the petition found that "unsuccessful defense" (presented by the respondents in the Rivera litigation) merely consisted of the testimony of petitioner. No appeal was taken by the City of Peekskill. Pedro Juan Rivera received judgment against the petitioner and the respondents on or about the 21st day of June, 1978. Less than a month later, on or about the 12th day of July, 1978, the respondents, acting through its agents and employees, determined that the initial order directing the representation of the petitioner was improper based upon new information (information that has never been brought forward).

On or about the 9th day of August, 1978, petitioner was charged with violating the Rules of Conduct of the Police Department of the City of Peekskill in that he did fail to conduct a proper investigation and unlawfully arrested one Pedro Juan Rivera.

On August 21, 1978, petitioner was afforded a hearing purportedly conducted pursuant to Section 75 of the New York State Civil Service Law and the City Manager, John E. Walsh, was designated as hearing officer. Walsh was also serving as Chief of Police.

The hearing was conducted without the benefit of a certified stenographer and was recorded only by a tape recording device over the objection of the attorney representing the petitioner. A review of that transcript disclosed statements apparently taken out of context and further discloses other discrepancies such as gaps in the official transcript. The transcript presented by the respondents is uncertified and does not bear any representation that it is a true and accurate transcript of the proceedings conducted.

Respondents' entire case, during said disciplinary proceeding, consisted of the judgment of the Supreme Court, Westchester County, that was rendered against the respondents and petitioner in favor of Pedro Juan Rivera. The Appellate Division made reference to the fact that the entire case presented by the respondents in that Supreme Court proceeding consisted of the testimony of the petitioner. The City of Peekskill paid said judgment and never appealed same.

The petitioner commenced this proceeding pursuant to subdivisions 3 and 4 of Section 7803 of the Civil Practice Law and Rules. A second cause of action was presented by petitioner that as the elected President of the Peeksill

Police Association (the union representing police officers employed by the respondents) he fell into disfavor with the respondents motivating the respondents to take affirmative action against him. The Appellate Division made no reference to petitioner's contention.

On August 13, 1979, the Appellate Division granted the petition herein and on December 3, 1979, granted the respondents' motion for leave to appeal to the Court of Appeals on the certified question, "Was the order of this Court dated August 13, 1979, properly made?"

The New York Court of Appeals reversed and reinstated the respondents' determination (Pet. App. 1a-2a). That Court impliedly expressly ruled the discharge proper under the

> "Order reversed, with costs, and the determination of respondents reinstated in a memorandum. Question certified answered in the negative." (Question certified: Was the order of the Appellate Division, Second Department, dated August 13, 1979, annulling the determination of the respondents-appellants finding petitioner-respondent guilty of violating its rules of conduct and terminating his employment as a police officer properly made?)

REASONS FOR GRANTING THE WRIT.

The decision below deprives petitioner of his rights under the Fourteenth Amendment as declared by this Court.

The decision of the New York Court of Appeals is contrary to the Fourteenth Amendment of the Constitution of the United States that guarantees the fundamental right of due process to citizens as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process * * *"

It has been held that the right to due process of law constitutes a "privilege and immunity secured and protected by this amendment." *U. S. v. Sutherland,* 37 F. Supp. 344.

A. The decision below in effect precluded petitioner's due process rights by the imposition of a concept that may be equated with *res judicata* or collateral estoppel.

Petitioner was discharged from public employment because he executed a warrant of arrest in accordance with the directions of his superior officers leading to a judgment against both petitioner and respondents that the individual arrested was falsely arrested. The Court of Appeals in effect ruled that the finding of false arrest was *res judicata* of the facts as that judgment was found to be substantial evidence. The Court ruled,

> "We agree with Mr. Justice Charles Margett, dissenting below, that respondents' determination is supported by substantial evidence on the record as a whole" (Pet. App. 1a).

It should be noted that only three (3) items of evidence were introduced against petitioner, to wit: the Rules of Conduct of the Police Department, the judgment of the Supreme Court finding the false arrest and the charges and specifications. No additional evidence and no testimony was adduced against the petitioner since these three (3) items and it can reasonably be implied that the only probative item was the judgment which was held to be substantial evidence; it is obvious that petitioner was estopped from showing that no culpability existed on his part. Therefore, Section 75, since it fails to establish any

measure or standard of proof other than the words "substantial evidence," clearly fails to protect the right of procedural due process.

It has been held in *Garrity v. New Jersey,* 385 U. S. 493, that "policemen, like teachers and lawyers, are not relegated to a watered down version of constitutional rights" (*id.,* at 500).

Although the contrary view of the Appellate Division seems eminently sensible (Pet. App. 3a), we accept, as we must, the Court of Appeals determination that a judgment of false arrest constitutes substantial evidence of wrongdoing in the context of the rules and regulations of a police department but it should be noted that "a State cannot foreclose the exercise of constitutional rights by mere labels." *N.A.A.C.P. v. Button,* 371 U. S. at 429.

Thus the Court below was wrong in stating that petitioner's discharge was proper and the finding that a judgment of false arrest stands alone as substantial evidence of a violation of the police department rules and regulations and as such, violates petitioner's Fourteenth Amendment rights. Indeed, it is so clear that the Court below erred that summary reversal may be appropriate.

CONCLUSION.

For the above stated reasons, this petition for a writ of certiorari to the New York Court of Appeals should be granted.

Respectfully submitted,

RICHARD HARTMAN,
Attorney for Petitioner,
300 Old Country Road,
Mineola, N. Y. 11501
(516) 742-9000.

APPENDIX.

Memorandum Decision of the Court of Appeals of the State of New York.

COURT OF APPEALS,

STATE OF NEW YORK.

2 No. 574
IN THE MATTER

OF

FRANK GODERRE,

Respondent,

v.

CITY OF PEEKSKILL, *et al.*,

Appellants.

(574) Richard S. Scanlan, White Plains, for appellant.
Reynold A. Mauro & Richard Hartman, Mineola, for respondent.

Memorandum

The order of the Appellate Division should be reversed and the determination of respondents terminating petitioner's employment by the City of Peekskill as a police officer should be reinstated, with costs.

Memorandum Decision of the Court of Appeals of the State of New York

We agree with Mr. Justice Charles Margett, dissenting below, that respondents' determination is supported by substantial evidence on the record as a whole. We add only that, though it would have been better practice for the hearing examiner to make specific findings and conclusions rather than, as he did, to quote extensively from the findings and conclusions of the Supreme Court Justice who tried the false arrest action against petitioner and the City, it is clear from the hearing transcript that the examiner was aware of the difference between the false arrest trial and the hearing before him and sought by questioning petitioner in relation to the Supreme Court findings simply to give petitioner the opportunity to offer any explanation and present any evidence he wished in relation to the arrest of Pedro Rivera.

* * *

Order reversed, with costs, and the determination of respondents reinstated in a memorandum. Question certified answered in the negative. All concur.

Decided December 16, 1980

August 13, 1979 Order of Appellate Division, Second Judicial Department, Granting the Petition.

B/rm

Leon D. Lazer, J. P.
Samuel Rabin
J. Irwin Shapiro
Charles Margett, JJ.

____AD2d ____
1515 E

A-May 21, 1979

IN THE MATTER

OF

FRANK GODERRE,

Petitioner,

v.

CITY OF PEEKSKILL, *et al.*,

Respondents.

Hartman & Lerner, Mineola, N. Y. (Reynold A. Mauro of counsel), for petitioner.

Richard S. Scanlan, White Plains, N. Y., for respondents.

August 13, 1979 Order of Appellate Division, Second Judicial Department, Granting the Petition

Proceeding pursuant *to CPLR article 78* to review a determination made after a hearing, dismissing the petitioner from his position as a police officer.

Petition granted; determination annulled, on the law, without costs or disbursements, and respondents are directed to reinstate petitioner, with back pay, less the amount of compensation earned in any other employment or occupation and any unemployment benefits he may have received.

The petitioner was charged with having violated several of the "Duties and Rules of Conduct for the Police Department, City of Peekskill" in that he failed to conduct a proper invstigation and wrongfully arrested one Pedro Rivera. The charges were precipitated by the entry of a money judgment, and underlying decision of the Supreme Court, Westchester County, in which petitioner, and through him, the City of Peekskill, were found liable to Pedro Rivera in the principal amount of $6,500 for false arrest. The basic facts surrounding the false arrest do not appear to be disputed.

On August 24, 1977 the Suffolk County police advised the Peekskill police that an arrest warrant had been issued for Pedro Juan Rivera. A physical description was provided which gave Rivera's age, height, weight, coloring, and physical characteristics, i. e., Rivera had a mustache, a scar, and a tattoo on his shoulder. Rivera was wanted for attempted robbery in the first degree. The information was given to Sergeant Hayes who took a group of officers, including the petitioner, to premises at 192 Union Avenue for the purpose of arresting Rivera. The landlady acknowledged that Rivera, who was a truck driver, lived at that address but stated that he was not at home.

Several days later, the petitioner noticed a truck outside the premises and called for a back-up team to assist in the

August 13, 1979 Order of Appellate Division, Second Judicial Department, Granting the Petition

arrest of Rivera. The officers entered the premises and found a male individual who acknowledged that he was Pedro Rivera. He was approximately the same height, weight and coloring of the Pedro Juan Rivera who was wanted by the Suffolk County police. The petitioner advised Rivera that he was wanted by the Suffolk County police. Rivera responded that he did not know what he could have done in Suffolk County, but made no strong objection to the arrest. Rivera was arrested and taken to the stationhouse where his identification was further checked by the Shift Supervisor, who determined that this Pedro Rivera was not the individual wanted by the Suffolk County police. They were so notified and Rivera was released.

Rivera then commenced a tort action alleging false arrest. An internal investigation was made and it was determined that the petitioner "had reasonable grounds to believe that Rivera was the subject of the warrant" and that he should therefore be defended by the City of Peekskill. The unsuccessful defense merely consisted of the testimony of the petitioner. No appeal was taken by the City of Peekskill. On the last day to appeal, the charges which are the subject of this proceeding were filed against the petitioner.

At the hearing, the only evidence introduced against the petitioner was the judgment and decision in Rivera's suit for false arrest. On behalf of the petitioner, Sergeant Hayes and another officer testified that they also would have arrested Rivera. A third individual who participated in the arrest testified that at "line-up" the patrolmen in the shift were told only that they should arrest Pedro Rivera, who lived at 192 Union Avenue, because he was wanted by the Suffolk County police for attempted robbery in the first degree. No physical description was given.

August 13, 1979 Order of Appellate Division, Second Judicial Department, Granting the Petition

The hearing officer refused to admit the testimony of an alleged expert who would have expressed an opinion as to whether the petitioner had followed proper procedure.

The petitioner testified to the general circumstances of the arrest as outlined above. He stated that he did not believe that it was significant that the Rivera he arrested did not have a mustache, because facial hair could be readily shaved. The petitioner also testified that he did not personally check for the presence of the tattoo because it was not normal procedure to ask a suspect to disrobe in his home. It is noted that there were other persons present at the time of the arrest and that Rivera's wife was calling other family members. Goderre testified that he was concerned that the arrest be completed and the suspect taken to the stationhouse before more people arrived who may have complicated the arrest.

The hearing officer found the petitioner guilty of the charges and directed that he be dismissed. The written decision merely lists the exhibits and witnesses and reproduces the decision rendered in the false arrest action. The evidence was neither reviewed nor analyzed. However, a review of the hearing transcript leaves little doubt that the hearing officer considered the Supreme Court finding of civil liability for false arrest to be prima facie evidence that the petitioner was guilty of the charges.

We agree that such a judgment is of some probative value. However, in the instant circumstances, the judgment is insufficient to constitute substantial evidence that the petitioner violated the Peekskill Police Department rules by failing to conduct a proper investigation and wrongfully arresting Pedro Rivera.

August 13, 1979 Order of Appellate Division, Second Judicial Department, Granting the Petition

In determining whether an administrative determination is supported by substantial evidence, it is necessary to look at the evidence as a whole and to consider the evidence produced by one party in connection with the evidence produced by the other party. Thus, seemingly conclusive evidence may lose all probative force when examined in light of other evidence (see, generally, *Matter of Stork Rest. v. Boland,* 282 NY 256, 274; 23 Carmody-Wait 2d, NY Prac, §145:20).

The respondents failed to introduce any proof as to what proper investigatory procedure and proper arrest procedure entails. Nor was it demonstrated how the petitioner violated such procedures except by relying on the collateral determination that Rivera had been falsely arrested. However, that determination was made in a wholly different procedural setting. It must be recognized that standards of reasonable conduct are partially dependent upon the interests sought to be protected in a particular case. Certainly, the interest in protecting innocent persons from the tortious encroachment of being falsely arrested is significantly different from the interest of preserving the integrity of a police force by punishing those who are guilty of misconduct. Absent evidence that the petitioner personally violated proper police procedure, the collateral determination that he wrongfully arrested Rivera is of only limited probative value. For purposes of departmental charges, it must also be shown that the petitioner's conduct was unreasonable in light of existing procedure and training.

From this perspective, there is no basis for personally penalizing the petitioner for the wrongful arrest. Although the Supreme Court Justice who decided the false arrest action found that the only similarity between the person ar-

rested and the person wanted by the Suffolk County police was the name, the instant record shows that they were also of similar height, weight and coloring. The Justice's presumption that Sergeant Hayes initially went to Rivera's address only for purposes of inquiry is rebutted by Hayes' hearing testimony that he went to the premises to arrest Rivera. Although the petitioner could have personally checked for the tattoo, no evidence was introduced to rebut his testimony that it was not normal procedure to ask a suspect to disrobe in his home. Furthermore, petitioner's explanation that he was anxious to effect the arrest before the arrival of Rivera's family members is not unreasonable. The conclusion that the petitioner's conduct was in accord with proper procedure is further supported by the unrebutted testimony that the other officers on the shift were instructed to arrest Pedro Rivera who lived at the subject address, and that those officers were not given a description of Rivera. The almost inescapable inference is that the patrolmen were to bring Rivera into headquarters where the supervisor would then determine whether it was the Rivera for whom the Suffolk County police had an outstanding warrant. This is exactly what was done.

In light of the evidence introduced at the hearing, the collateral and unreviewed determination that Rivera was falsely arrested is of diminished probative value. In the absence of any evidence that the arrest was occasioned by a violation of proper procedure, the unrebutted evidence that the petitioner acted in reasonable accord with his training and instructions is persuasive. The courts of this and other jurisdictions have frequently dismissed criminal indictments because there was no reasonable cause to make the initial stop or arrest. In so doing, it is generally not anticipated that the arresting officer will be exposed to

August 13, 1979 Order of Appellate Division, Second Judicial Department, Granting the Petition

charges of misconduct. We are therefore hesitant to sustain such charges based upon the mere scintilla of proof that an individual had been wrongfully arrested. More proof is required to satisfy the substantial evidence test and, therefore, the determination should be annulled.

Lazer, J.P., Rabin and Shapiro, JJ., concur.

MARGETT, J., dissents and votes to confirm the determination and dismiss the proceeding on the merits, with the following memorandum:

I believe respondents' determination to be supported by substantial evidence on the record as a whole. It should be noted that the description of the suspect possessed by petitioner was that of a man 12 years younger than Mr. Rivera, with a scar on his *nose*. Furthermore, Mr. Rivera had apparently been asleep and was in a partial state of undress at the time he was arrested. There would have been little difficulty in checking for a shoulder tattoo with the words, "Padre, Madre, Mia", before compelling the suspect to accompany the officers to police headquarters.

In light of the fact that this is merely one of four incidents in which petitioner has made questionable use of his authority as a police officer, I do not believe the penalty of dismissal was unwarranted (see *Matter of Pell v. Board of Educ.*, 34 NY2d 222).

August 13, 1979

Findings and Determination of Administrative Hearing Examiner, with Transmittal Letter Dated September 19, 1978.

(Seal)

CITY OF PEEKSKILL

CITY HALL

Peekskill N. Y. 10566

September 19, 1978

Mr. Frank Goderre
15 Revolutionary Road
Peekskill, N. Y. 10566

Dear Mr. Goderre:

Enclosed find copy of my decision in the matter of your Disciplinary Hearing. Please note you have been terminated as of 4 p.m. September 19, 1978.

The Comptroller's office has been directed to check the records and pay you any monies due.

Also be advised that the charges preferred against you dated September 8, 1978 are hereby withdrawn without prejudice.

Very truly yours,

JOHN E. WALSH
Hearing Officer

JEW:vcb
Enclosure

Findings and Determination of Administrative Hearing Examiner, with Transmittal Letter Dated September 19, 1978.

STATE OF NEW YORK,

CITY OF PEEKSKILL.

IN THE MATTER

of

Disciplinary Charges against FRANK GODERRE under and pursuant of Section 75 of the Civil Service Rules of the State of New York and the City of Peekskill.

JOHN E. WALSH, Hearing Examiner

Patrolman Frank Goderre has been charged with failing to conduct a proper investigation and unlawfully arresting one Pedro Rivera. Specification No. 1 states that Patrolman Frank Goderre did wrongfully arrest one Pedro Rivera for attempted robbery and that in doing so, he (Patrolman Goderre) violated the following Duties and Rules of Conduct for the Police Department of the City of Peekskill:

12.1.1 Conduct which brings discredit upon the Department.

12.1.5 Inattention to duty

12.1.9 Incompetency or inefficiency in the performance of duty.

Findings and Determination of Administrative Hearing Examiner, with Transmittal Letter Dated September 19, 1978

The written charge and specification was served on Patrolman Goderre and a hearing was scheduled to be heard August 21, 1978, at 9:00 a.m. in City Hall.

The hearing commenced at approximately 9:55 a.m. on August 21, 1978 and the charges were presented by Special Counsel Leone Pecoraro. Mr. Pecoraro submitted a decision of Supreme Court Justice Howard A. Jones as the basis of this disciplinary hearing since this matter of a wrongful arrest was the subject of a lawsuit against the City of Peekskill and Patrolman Goderre.

Judge Jones, after a two day non-jury trial, rendered his decision on June 21, 1978, and in his Findings of Fact and Conclusions of Law stated as follows:

The statewide teletype reflecting an arrest warrant issued for a Pedro Juan Rivera for attempted robbery was received in due course at the Peekskill Police Department on August 24, 1977, and it clearly contained sufficient biographical data to distinguish the person sought from this plaintiff. Indeed, the only common factor between the two was the similarity of name, a fairly common one. Nevertheless, a group of officers led by a Sergeant Hayes went to plaintiff's residence on that date, presumably to check whether plaintiff was the wanted suspect. They were informed by the landlady that plaintiff was on a trip as part of his occupation as an independent long-haul trucker. Upon their return to headquarters, the teletype was posted along with an accompanying handwritten note by Hayes containing a detailed description of the scars and tattoos of the original suspect, apparently garnered through telephone calls to the originating agency in Suffolk County, either before or after the visit to plaintiff's apartment. This handwritten note combined most of the

same biographical and physical data contained in the teletype as well as the new physical description, scar and tattoo information, all of which apparently were then summarily associated with the Pedro (no middle name) Rivera living at plaintiff's address.

Three days later, on August 27, this defendant police officer, Goderre, at some point shortly after coming on duty that day, saw the teletype and memo still posted; later, he saw plaintiff's rig parked near his apartment. He went to the location without a warrant or even the teletype, verified that plaintiff was now home and after a backup team summoned by him had arrived, he proceeded to arrest plaintiff. Shortly after having gone to sleep in the afternoon hours of that day, plaintiff was awakened by the defendant officer, placed under arrest, read his rights, compelled to dress, denied his request to make a phone call and was led out of his apartment building, into a patrol car and taken to Police Headquarters where he was held in handcuffs, and *incommunicado,* although proclaiming his innocence throughout. Finally, a simple physical examination for identifying scars and tattoos eliminated him as the wanted suspect and he was thereafter released.

Defendant police officer's actions were justified if, by a preponderance of evidence, he shows he had reasonable cause for believing that plaintiff was the suspect sought by the Suffolk County authorities. This reasonable cause existed if the facts and circumstances known to the defendant or the information readily available to him before making the actual arrest were such as to lead a reasonable and prudent man to believe that the plaintiff was the suspect sought. The total lack of preliminary inquiry or observation at the apartment as to full name, age, date of

birth, color of hair, height and weight (all different), moustache, scars and tattoos (all non-existent) and Suffolk County residence (plaintiff was a Peekskill resident for sixteen years), compels the conclusion that reasonable cause did not exist. Hence, civil liability is clearly established.

With respect to compensatory damages, plaintiff has testified that as a member of a minority living in a predominantly white neighborhood, he has suffered substantial mental anguish, shame and humiliation and injury to his reputation as a hard-working and respectable member of the community. No medical evidence as to treatment for these conditions has been introduced. However, it is uncontested that plaintiff has no arrest or conviction record and is a respectable citizen.

As to the measure of damages, the only serious factual disputes between the parties relate to the length of time that plaintiff was detained at headquarters (after the 15-20 minute detention at the apartment) and the number of friends, neighbors or relatives who either witnessed the plaintiff being led out of his apartment in handcuffs or his final release from headquarters.

The Court finds that by a preponderance of credible evidence, the period of detention at headquarters was in excess of the 15 or so minutes claimed by defendants and closer to the two hour period claimed by the plaintiff. The evidence on this point, particularly certain alterations made in defendant's time records for the date in question (albeit with attempted explanation), and common sense, compels this conclusion.

Findings and Determination of Administrative Hearing Examiner, with Transmittal Letter Dated September 19, 1978

During the Hearing dates, August 21, 1978 and August 24, 1978 testimony was given by the following witnesses:

1. Dep. Comm. of Public Safety Walter Jones

2. Richard Laboda a former Police Dept. Station House Officer

3. Sgt. Edward Hayes

4. Patrolman John Michael Cindrich

5. Sgt. Randy Shubert

6. Patrolman Frank Goderre

7. Arthur Haugh

8. Mr. Benjamin Hersh, Esq.

Also introduced was the following documentary evidence:

City of Peekskill Exhibit 1—Letter to Police Officer Frank Goderre notifying him of the charges and specifications and advising him of his suspension.

City of Peekskill Exhibit 2—Duties and Rules of Conduct for the Police Department of the City of Peekskill.

City of Peekskill Exhibit 3—Decision of Supreme Court Justice Howard A. Jones.

Findings and Determination of Administrative Hearing Examiner, with Transmittal Letter Dated September 19, 1978

City of Peekskill Exhibit 4—Copy of judgment *re:* Pedro Rivera, Plaintiff against the City of Peekskill and Frank Goderre, Defendant.

Respondent's Exhibit No. 1—Subpoena *Duces Tecum* for certain files, books and records pertaining to the arrest of Pedro Rivera.

Respondent's Exhibit No. 2—Patrolman Goderre Answer to the charges brought against him.

Respondent's Exhibit No. 3—Interview of Patrolman Goderre by Lt. J. Nelson.

Respondent's Exhibit No. 4—Interview of Sgt. Randy Shubert by Lt. J. Nelson.

Respondent's Exhibit No. 5—Teletype received from Suffolk Co. Police Dept. by the City of Peekskill.

Respondent's Exhibit No. 6—Memo from Dep. Comm. Walter Jones to Peter Davidson *re:* Investigation of Pedro Rivera arrest.

Respondent's Exhibit No. 7—Copy of Section 120.60 of Criminal Procedure Law.

Respondent's Exhibit No. 8—Sgt. Edward Hayes Memo Description of Pedro Juan Rivera.

Respondent's Exhibit No. 9—Sgt. Shubert's memo to Sgt. Hayes.

Findings and Determination of Administrative Hearing Examiner, with Transmittal Letter Dated September 19, 1978

Respondent's Exhibit No. 10—Letter from Corp. Counsel Peter Davidson to Police Officer Goderre *re:* Rivera against the City of Peekskill and Frank Goderre.

I have examined the transcript of this hearing and carefully gone over the Exhibits and based upon the record herein, I find the respondent guilty of the charges. Accordingly, it is my determination that the punishment to be imposed upon the respondent is dismissal from Police Service of the City of Peekskill effective 4 p.m. September 19, 1978.

Transcript of the hearing is filed in the City Clerk's Office and a copy is to be placed in the Personnel Record of the respondent.

JOHN E. WALSH,
Hearing Officer

Duties and Rules of Conduct for the Police Department—City of Peekskill, New York.

ARTICLE XII

RULES OF CONDUCT

12.1 A member of the Department found guilty of any of the following acts will be considered in violation of the Rules and Regulations which govern the Police Department of the City and will be subject to disciplinary action.

12.1.1 Conduct which brings discredit upon the Department.

2. Failure to perform a duty.

3. Disobedience of an order.

4. Insubordination or disrespect toward a Superior Officer.

5. Inattention to duty.

6. Lounging or sleeping on duty.

7. Being absent from duty without proper authorization.

8. Leaving duty assignment without being properly relieved or without proper authorization.

9. Incompetency or inefficiency in the performance of duty.

Duties and Rules of Conduct for the Police Department—City of Peekskill, New York

10. Entering any tavern, liquor store or bar in uniform or any part thereof except when it is necessary for inspection or for the immediate performance of a police duty.

11. Drinking alcoholic beverages while on duty. Members in plain clothes may drink alcoholic beverages while on duty, only when necessary to accomplish a police purpose while acting under specific orders of a Superior Officer.

12. Drinking alcoholic beverages while in uniform or any part thereof whether on or off duty.

13. Intoxication whether on or off duty.

14. Violation of any duly constituted law.

15. Disorderly conduct.

16. Immoral conduct.

Office-Supreme Court, U.S.
FILED
APR 22 1981
ALEXANDER L. STEVAS, CLERK

No. 80-1551

Supreme Court of the United States

OCTOBER TERM, 1980

IN THE MATTER OF THE APPLICATION

OF

FRANK GODERRE,

Petitioner,

—against—

CITY OF PEEKSKILL, JOHN E. WALSH, City Manager and Commissioner of Public Safety, and CITY OF PEEKSKILL POLICE DEPARTMENT, WALTER J. JONES, Police Commissioner,

Respondents.

On Writ of Certiorari to the Court of Appeals of New York

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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No. 80-1551

Supreme Court of the United States

OCTOBER TERM, 1980

IN THE MATTER OF THE APPLICATION

OF

FRANK GODERRE,

Petitioner,

—against—

CITY OF PEEKSKILL, JOHN E. WALSH, City Manager and Commissioner of Public Safety, and CITY OF PEEKSKILL POLICE DEPARTMENT, WALTER J. JONES, Police Commissioner,

Respondents.

On Writ of Certiorari to the Court of Appeals of New York

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Jurisdiction

Petitioner claims jurisdiction under 28 U.S.C.A. §1257(3) which provides in pertinent part as follows:

> §1257. *State courts; appeal; certiorari*
>
> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * * (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Statutes Involved

The statutes here involved are McKinney's, Book 9, New York Civil Service Law Sections 75 and 76 which provide in pertinent part as follows:

> § 75. *Removal and other disciplinary action*
>
> "1. Removal and other disciplinary action. A person described in paragraph (a), or paragraph (b), or paragraph (c), or paragraph (d) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

(a) A person holding a position by permanent appointment in the competitive class of the classified civil service, * * *

"2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, or by a representative of a recognized or certified employee organization, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

"3. Suspension pending determination of charges; penalties. Pending the hearing and determination of charges of incompetency of misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for

a period not exceeding thirty days. If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service; provided, however, that the time during which an officer or employee is suspended without pay may be considered as part of the penalty. If he is acquitted, he shall be restored to his position with full pay for the period of suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. If such officer or employee is found guilty, a copy of the charges, his written answer thereto, a transcript of the hearing, and the determination shall be filed in the office of the department or agency in which he has been employed, and a copy thereof shall be filed with the civil service commission having jurisdiction over such position. A copy of the transcript of the hearing shall, upon request of the officer or employee affected, be furnished to him without charge.

"4. Notwithstanding any other provision of law, no removal or disciplinary proceeding shall be commenced more than three years after the occurrence of the alleged incompetency or misconduct complained of and described in the charges provided, however, that such limitation shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime."

§ 76. *Appeals from determinations in disciplinary proceedings.*

"1. Appeals. Any officer or employee believing himself aggrieved by a penalty or punishment of demotion in or dismissal from the service, or suspension without pay, or a fine, imposed pursuant to the provisions of section seventy-five of this chapter, may appeal from such determination either by an application to the state or municipal commission having jurisdiction, or by an application to the court in accordance with the provisions of article seventy-eight of the civil practice law and rules. If such person elects to appeal to such civil service commission, he shall file such appeal in writing within twenty days after service of written notice of the determination to be reviewed, such written notice to be delivered personally or by registered mail to the last known address of such person and when notice is given by registered mail, such person shall be allowed an additional three days in which to file such appeal.

"2. Procedure on appeal. Where appeal is taken to the state or municipal commission having jurisdiction, such commission shall review the record of the disciplinary proceeding and the transcript of the hearing, and shall determine such appeal on the basis of such record and transcript and such oral or written argument as the commission may determine. The commission may direct that such appeal shall be heard by one or more members of the commission or by a person or persons designated by the commission to hear such appeal on its behalf, who shall report thereon with recommendations to the commission. Upon such appeal the commission shall permit the employee to be represented by counsel.

"3. Determination on appeal. The determination appealed from may be affirmed, reversed, or modified, and the state or municipal commission having jurisdiction may, in its discretion, direct the reinstatement of the appellant or permit the transfer of such appellant to a vacancy in a similar position in another division or department, or direct that his name be placed upon a preferred list pursuant to section eighty-one of this chapter. In the event that a transfer is not effected, the commission is empowered to direct the reinstatement of such officer or employee. An employee reinstated pursuant to this subdivision shall receive the salary or compensation he would have been entitled by law to have received in his position for the period of removal including any prior period of suspension without pay, less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The decision of such civil service commission shall be final and conclusive, and not subject to further review in any court.

"4. Nothing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division. Such sections may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization pursuant to article fourteen of this chapter. Where such sections are so supplemented, modified or replaced, any employee against whom charges have been pre-

ferred prior to the effective date of such supplementation, modification or replacement shall continue to be subject to the provisions of such sections as in effect on the date such charges were preferred."

Statement of the Case

Chronology of events in Goderre's police career.

On April 13, 1973, Goderre was appointed to the position of Police Officer with the City of Peekskill (R. 21).*

Two years later, on May 4, 1975, Goderre grabbed a 13 year old youth by the collar in Police Headquarters while the youth was complaining about a " 'cop bothering me out on the street' " (R. 53). In the presence of Sergeant William J. Carlin, Acting Sergeant Anderson, a Detective Rundel, Goderre tried to drag him into the officer's locker room (R. 53). Sergeant Carlin "told Goderre to let go of the youth and it took a couple of minutes for it to register. This was a complete loss of control on the part of Ptl. Goderre, with shouting almost to the point of hysteria" (R. 53). This was "not the only time that this loss of control has happened to Ptl. Goderre. There have been a couple of times that it has happened and I told him so this afternoon" (R. 53). He was later reprimanded (R. 53).

In August 1977, Goderre was admonished for abusing another child (R. 41).

On August 24, 1977 (the incident which precipitated Goderre's discharge), armed with a Suffolk County tele-

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* Parenthetical page reference in the Record of the New York State Court of Appeals.

type identification features of a one Pedro Juan Rivera, to wit: his age, height, weight, color, mustache, scar on his nose, and tattoo on his shoulders with the words: "Padre, Madre, Mia," Goderre arrested a man having the same first and last name (no middle name), 12 years younger but having no mustache, no scar on his nose, and no tattoo on his shoulders (R. 14 & 42).

On October 18, 1977, after an inter-departmental investigation, Police Commissioner Walter J. Jones recommended to the Peekskill City Corporation Counsel that the City defend Mr. Goderre in a Supreme Court false arrest action brought against the City and Mr. Goderre (R. 158).

On April 28, 1978, a one Simon Knight complained to Police Commissioner Walter D. Kirkland that because Goderre lost a fist fight with him, Goderre subsequently refused to take any police action against an individual throwing rocks at his van (R. 41-42). Apparently Goderre was moonlighting as an auto-body repairman and insisted that Mr. Knight had to accept the inferior auto body repair job because Goderre was a Police Officer (R. 42). The fist fight then ensued (R. 42).

On May 25, 1978, a Mr. Torrisi, who came to Police Headquarters upon a request by it regarding a possible connection with an alleged hit and run accident in the neighboring town of Yorktown, left the Peekskill Police Headquarters after a period of time because the Yorktown Police did not appear (R. 42). Goderre drew his service revolver and pointed it at Mr. Torrisi's head, forcing him to the ground on his belly, pushing his foot into his back, handcuffing him and returning him to Police Headquarters (R. 42).

On Thursday, May 18, 1978, Goderre was informed that a one Perry Maxey was seen at City Hall at or about the time someone had her pocketbook stolen (R. 43). "Without ascertaining the facts nor a description of the purse snatcher

* * * who was wearing blue jeans and blue and white sneakers", moments later Goderre entered an apartment and arrested Perry Maxey who was not wearing blue jeans and blue and white sneakers, but rather was a Peekskill employee in City Hall to pick up his pay check (R. 47).

On July 10, 1978, a $6,798.15 judgment was served upon the City by Pedro Rivera who successfully won his false arrest action against the City and Goderre (R. 164).

On the basis of the Perry Maxey false arrest and a further investigation in the Pedro Rivera false arrest case, on July 12, 1978, the City recanted its opinion that Goderre be defended (R. 57), that is, recanted the recommendation to defend him in the false arrest action (R. 158).

On July 14, 1978, the City gave Mr. Goderre a copy of the judgment and advised him that it did not intend to appeal, and that if he chose to appeal he could do so at his own expense (R. 164). Mr. Goderre never appealed the Judgment.

On August 9, 1978 Mr. Goderre was served with the present charges (R. 130), and on August 21, 1978 the hearing commenced and concluded on August 24, 1978 (R. 58-68, & 69-127).

On September 8, 1978 [allowing 90 days to lapse], formal charges were served upon Mr. Goderre for wrongfully arresting Perry Maxey (R. 55-56).

Finally, on September 19, 1978, Mr. Goderre was served with the Findings and Determination firing him, and at that time the disciplinary charges arising out of the Perry Maxey false arrest matter were "withdrawn without prejudice" (R. 30).

Trial before Mr. Justice Jones.

At a plenary trial in the Supreme Court Westchester County, Acting Supreme Court Justice Howard A. Jones found that Pedro Rivera was "wrongfully arrested" (R. 138), "and was unlawfully detained for over two hours" (R. 138).

The facts, as found by Mr. Justice Jones, are that pursuant to a Suffolk County teletype seeking the arrest of a one Pedro Juan Rivera for attempted robbery, there was sufficient biographical data to distinguish the person sought from the plaintiff in that action (R. 139). The teletype (R. 157) provides, *inter alia,* the following data:

> PEDRO JUAN RIVERA
> BORN AUGUST 4, 1956
> HEIGHT 5′ 6″
> WEIGHT 156 LBS.
> EYES BROWN
> HAIR BROWN
> ARREST WARRANT
> ATTEMPTED ROBBERY

Led by Sergeant Hayes, a group of officers went to the Plaintiff's residence and were informed by the landlady that he was on an employment-related trip as an independent long-haul trucker (R. 139).

Upon their return to headquarters, a hand written note by Sergeant Hayes was posted with the teletype (R. 139). The hand written note (R. 162) contained the following additional information:

> TATTOO CROSS ON LEFT SHOULDER
> PERODOU MADRA MIA ON BACK
> MUSTACHE
> SCAR ON NOSE

Three days later, on August 27, 1977, Goderre saw the teletype and memo still posted and late saw Plaintiff's rig parked near his apartment (R. 140). After verifying that he was home, Goderre called a backup team (R. 140).

Shortly after Plaintiff had gone to sleep, he was awakened by Goderre, placed under arrest, compelled to dress and taken to Police Headquarters in handcuffs (R. 140).

At Police Headquarters, "a simple physical examination for identifying scars and tattoos eliminated him as the wanted suspect" (R. 140).

Mr. Justice Jones found "a total lack of preliminary inquiry or observation at the apartment as to full name, age, date of birth, color of hair, height, and weight (all different), mustache, scars or tattoos (all non-existant) and Suffolk County residents (Plaintiff was a Peekskill resident for sixteen years)" (R. 140-141).

Mr. Justice Jones found that contrary to Mr. Goderre's claim that the Plaintiff was detained a mere 15 minutes at Police Headquarters, the preponderance of evidence was that Plaintiff was detained at Headquarters approximately 2 hours (R. 141).

Mr. Justice Jones also found Mr. Goderre's claim that no one witnessed plaintiff being led to the police vehicle was "incredible" and contrary to the fact that several people including neighbors and relatives were present (R. 142).

Disciplinary proceedings against Goderre.

On August 9, 1978, Goderre was served (R. 130) with charges and specifications for wrongfully arresting Pedro Rivera (R. 132) in violation of the Police Rules of Conduct §§12.1.1, 12.1.5, and 12.1.9, which provide as follows (R. 137):

> "12.1.1 Conduct which brings discredit upon the Department."
>
> "12.1.5 Inattention to duty."
>
> "12.1.9 Incompetency or inefficiency in the performance of duty."

On or about August 14, 1978 Goderre interposed a general denial (R. 149).

The disciplinary hearing was held on August 21, 1978, and Goderre was represented by counsel.

Without objection on the part of Mr. Goderre's counsel, Mr. Justice Jones' decision was introduced as an exhibit against Mr. Goderre (R. 163), as was the Judgment entered on it (R. 63-64). The City rested on the Decision and Judgment (R. 64).

At the request of Goderre's counsel, the hearing was adjourned to August 24, 1978 (R. 64-68).

At the continued date of the hearing, Goderre's first witness was Walter J. Jones, Deputy Commissioner of Public Safety (R. 69). He testified that in response to the Notice of Claim filed by Pedro Rivera he directed an investigation be conducted which consisted of

> "Interviewing of the officers concerned reviewing the paper reports" (R. 70).

Walter Kirkland and Det. Nelson conducted that investigation (R. 70).

He identified Goderre's Exhibit "3" (R. 151) which was submitted to Walter Kirkland (R. 71). It is the interview by Det. Nelson of Goderre (R. 71), and in it Goderre admits that he saw Sergeant Hayes message along with the teletype on the clipboard:

> "I was off a couple of days and came into work extra on the 27th. I seen the TT and message on the Clip board . . ." (R. 152).

The interview of Mr. Goderre by Det. Nelson continued,

> "Pedro Rivera was in his apartment with his wife * * * I advised Pedro Rivera of his rights and told him that there was a warrant for his arrest. I handcuffed took him down a flight of stairs and put him in the rear of my police car.
>
> * * * I took him to the interrogation room, took the hand cuffs off. Sgt. Shubert came to the interrogation with the teletype. When the names and age did not match, Sgt. Shubert left to make a phone call. He came back and we released Rivera. Before we released him he opened his shirt and there was no tattoos" (R. 152).

Next, Deputy Commissioner Jones identified Exhibit "4" (R. 153) which was an interview by Det. Nelson of Sergeant Shubert (R. 72). The interview of Sergeant Shubert by Det. Nelson stated:

> "When he came in with Rivera I knew it was the wrong one, because I knew the person that Goderre came in with. *I went down to the interrogation room and told Goderre that the T.T. stated the person who was wanted was 21 years of age. The person he has is 33.* I asked Rivera to take off his shirt and he had no tattoos only a few scars on the forearm. I told Goderre to release him" (R. 154). [Italics added for emphasis].

During the interview, Sergeant Shubert also stated that Mr. Rivera was only detained at the Police Headquarters "about 10 minutes" (R. 154).

Deputy Commissioner Jones identified the teletype (discussed earlier) as Exhibit "5" (R. 157). The investigation consisted of these three Exhibits, "3", "4", and "5", and they were the only documents of which he was aware (R. 72).

Based upon these three documents, Deputy Commissioner Jones, by his October 18, 1977 letter to the Peekskill Corporation Counsel, recommended that the City defend Goderre in the false arrest action brought against Goderre and the City by Pedro Rivera (R. 73-74, and R. 159).

Goderre's next witness was Richard LaBoda who testified that he received a telephone call from the Suffolk County Police, giving the information as to the height, weight, medium built, and tattoo and personally passed it on to Goderre:

> "I wrote it down as he was giving it to me and I passed it on to Patrolman Goderre * * *. When I passed it, I handed it to him personally" (R. 79-80).

Goderre then called Sergeant Edward Hayes to the witness stand (R. 80). He was one of the officers who accompanied Goderre to Pedro Rivera's home the first time on August 24, 1977 (R. 82), and saw Patrolman Goderre and Detective Evans enter the dwelling and converse with the landlady (R. 82).

Sergeant Hayes also stated that he would have "arrested" Pedro Rivera that first day based upon the information known to him (R. 83 & 84).

He identified his own handwritten note (Exhibit "8", R. 162) which he put on a clipboard (R. 83) on the basis of the information he received from Detective Shoenig (R. 83).

Goderre called John Michael Sindrich, a Police Officer who went to Pedro Rivera's home on the first day, August 24, 1977, with Goderre (R. 86). He testified that he too would have arrested Pedro Rivera on August 24, 1977 based upon the information then known (R. 88).

Goderre then called Sergeant Randy Shubert to testify (R. 89). Sergeant Shubert stated at headquarters that he looked at Pedro Rivera's driver's license and noticed the discrepancies:

> "I checked the date of birth on the license with the teletype that I had and they didn't correspond. I then asked Mr. Rivera if he would remove his shirt, so that I could check for tattoos and scars that were on the, I believe, handwritten message, and he did so. He didn't have marks or anything" (R. 90).

Petitioner Frank Goderre then testified (R. 94). Goderre conceded that he received the note handed to him by Mr. LaBoda (R. 96), that he conversed with Pedro Rivera's landlady on August 24, 1977, and that she told him he was a truck driver and was not then home (R. 97), but *denied* receiving any further information between August 24 and the day of the arrest on August 27, 1977:

> "Mr. Dempsey: Between August 24th and August 27th did anyone in Police Headquarters talk to you about Pedro Rivera?
>
> Ptl. Goderre: Not that I know of.
>
> Mr. Dempsey: Did anyone indicate to you that any further information had been received from Suffolk County about Pedro Rivera?
>
> Ptl. Goderre: Not that I know of" (R. 98).

Goderre testified that on August 27, 1977 he again saw and conversed with the landlady before proceeding to Pedro Rivera's apartment (R. 98).

Also prior to entering Pedro Rivera's apartment, Goderre encountered Pedro Rivera's wife, talked to her, *then* entered the apartment and found Pedro Rivera awake:

> "At the same time a woman came down the stairs. She was a Spanish woman and she identified herself as Mrs. Rivera. Immediately Patrolman Arthur Haugh, who was the responding back-up unit, met me at the front porch of 192 Union Avenue. We said we wanted to see her husband, she yelled up the stairs to the second floor apartment. I don't understand Spanish but she yelled Pedro and whatever else, I don't know, but she said something. We followed her upstairs to the hallway, we entered the apartment looked to the left and there was a man later identified to me as Pedro Rivera. He was awake." (R. 98).

Goderre continued,

> "He was standing in the living room, he had a shirt on and was just buckling his pants. I don't believe he had shoes or socks on. I advised him that there was that we had received a teletype printout for the arrest of him, for attempted robbery, first degree." (R. 99).
>
> * * *
>
> "Well, first I gave him what it was, the warrant for, also advised him of the Miranda warning from a prepared card. Then he said 'Gee, I don't know or something to the effect that I don't know what I could have done in Suffolk County. I said I have to take you to Headquarters, and he said, let me get dressed and put my shoes on. He also wanted

> to go to the bathroom. Considering that the armed robbery in the first degree, in my belief, is of a very violent nature, we did follow him wherever he went, only for our own safeguard, to check for weapons. He wanted to go to the bathroom, I looked into the bathroom to make sure there was nothing that could be used against Patrolman Haugh and myself. We also allowed him to put his shoes on, went to the bedroom. Then, when we got to the hallway, Mrs. Rivera said 'Wait (she was on the phone) my relatives are coming over, can you wait til they come?' At that point I figured it would only be worse circumstances of delaying, of staying there any longer. I said no we couldn't. I immediately . . ." (R. 99).

Goderre concedes that he did testify at the false arrest trial in Supreme Court (R. 103).

He was the only witness who testified on behalf of the defendants in that Supreme Court action (R. 103).

He concedes that he received the July 14, 1978 letter by the City's Corporation Counsel enclosing a copy of the judgment and advising him to appeal at his own expense if he was inclined to appeal (R. 104 & 164).

He conceded on cross-examination that on August 24, 1977 he did learn that the individual sought in the warrant had tattoos a scar on his face and a mustache (R. 105). He also conceded that he knew on August 24, 1977 that the scar was "on the nose" (R. 106), that the tattoo was "on the shoulder" (R. 106), and that the tattoos had the words "Padre, Madre, Mia" (R. 106).

After concluding his testimony, Goderre then called Arthur Haugh, a former police officer with the City (R. 113). He testified that he personally knew Pedro Rivera and that he too would have arrested Pedro Rivera based upon the information then known (R. 115).

However, this witness, Mr. Haugh, resigned as a police officer under a cloud (R. 116). Apparently, there were two prior disciplinary proceedings brought against this witness (R. 117). One resulted in a suspension and the other resulted in his forced resignation (R. 117). Both charges were for "incompetence" and "misconduct" (R. 117).

Goderre's next witness was Police Officer Vincent Puma (R. 119). He was called to offer independent expert testimony concerning the propriety of the conduct of Goderre (R. 119). The Hearing Officer would not allow this testimony (R. 121).

Goderre's last witness was Benjamin B. Hersh, Esq., an attorney in Peekskill (R. 122), who tried the false arrest action on behalf of Pedro Rivera (R. 124).

He testified that in the Supreme Court false arrest action, on Plaintiff's case, Pedro Rivera, his wife, and a neighbor testified (R. 124).

The City's prosecuting attorney advised the Hearing Officer that he wished the Hearing Officer to review Goderre's personnel file (R. 126). The City agreed to allow Mr. Goderre's attorney to review the same personnel file (R. 126). Mr. Goderre consented to this (R. 126).

Findings and Determination of Hearing Examiner.

On September 19, 1978, Goderre was given a copy of the Findings and Determination of John E. Walsh, the Hearing Examiner (R. 30).

After reciting the findings of fact and conclusions of law and the decision of Acting Supreme Justice Howard A. Jones (R. 31-34), the Hearing Examiner enumerated the witnesses and documents admitted into evidence at the disciplinary hearing (R. 35-36).

The Hearing Examiner stated that he carefully considered this evidence, then, "based upon the record herein", he found Goderre guilty of the charges (R. 36-37).

ARGUMENT

POINT I

Question was never presented to the New York State Courts.

The tendered federal questions have never been presented to the state courts. This is a prerequisite under 28 U.S.C.A. §1257. *Crowell* v. *Randell,* 35 U.S. 368, [10 Pet.], 9 L.Ed. 458 (1836). Indeed, it is difficult to determine what provision in New York Civil Service Law §75 that the Petitioner herein is challenging.

POINT II

Goderre's failure to appeal the judgment of Mr. Justice Jones, and failure to object to its admission into evidence at the hearing, require that its correctness be conclusively assumed.

The correctness of the judgment in the false arrest action must be conclusively assumed in the absence of appeal (*Potter* v. *Emerol Manufacturing Co.*, 275 App.Div. 265, 89 N.Y.S.2d 68, at 70 [1st Dept. 1949]), and its effect is that of estoppel binding upon the police officer as well as the municipality itself. *U.S.* v. *County Court of Knox County*, 122 U.S. 306, 7 S.Ct. 1171, 30 L.Ed. 1152 (1887).

POINT III

The City's determination reinstated by the Court of Appeals was supported by substantial evidence and did not violate this Court's "independent judgment" rule.

This Court's seminal opinion in *Morgan* v. *United States*, 304 U.S. 1, 82 L.Ed. 1129 (1937), and its application under New York law (*Kilgus* v. *Bd. of Estimate of City of N.Y.*, 308 N.Y. 620 [1955]; *Taub* v. *Pirnie*, 3 N.Y.2d 188 at 195, 165 N.Y.S.2d 1 at 5 [1957]; *DiMarsico* v. *Ambach*, 48 N.Y. 2d 576, 424 N.Y.S.2d 107 [1979]) was specifically briefed in the Court of Appeals. The Court of Appeals expressly stated that the facts (same as in the above Statement of the Case), clearly indicate that far more evidence than the false arrest judgment was adduced at the fact-finding hearing through Petitioner's own witnesses. Petitioner was represented by counsel.

Petitioner elected his remedy under N.Y. Civil Service Law §§ 75 and 76 to commence an Article 78 proceeding, yet never availed himself of Civil Practice Law and Rules §7804 which provides in pertinent part as follows:

> "* * * The petitioner may raise an objection in point of law to new matter contained in the answer by setting it forth in his reply or by moving to strike such matter on the day the petition is noticed or re-noticed to be heard".

Petitioner neither replied nor ever moved to strike any material in the answer albeit he was represented by counsel. All that material was in the personnel file made available to Petitioner and his counsel (R. 126-127).

Petitioner makes a vague claim that the typewritten record had gaps and was inaccurate; however, he has never proferred to point out where, nor has he shown any exhibits or testimony missing.

The simple truth of the matter is that the evidence against him was so substantial as to be frightening to think that police conduct such as this actually took place. This is as clear as the facial scars and body tattoos on the shoulder and back of the person described in the warrant the absence of which Petitioner never took interest to note in a non-exigent arrest of the successful false arrest plaintiff. Failing to learn by his mistakes, Petitioner similarly ignored glaring identifying information in arresting a City employee (Perry Maxey) while the first charge was still pending. The disciplinary charge for the latter was withdrawn when Petitioner was fired after hearing on the present charges.

In its brief in the Court of Appeals, the City offered if given the opportunity to spell out in detail its specific findings since Petitioner persists in exhaulting form over substance. Petitioner did not respond to that offer.

CONCLUSION

This application should be denied, because Petitioner fails to meet this Court's threshold jurisdictional requirement, because he is estopped by his own defaults, and because the determination removing him from office was supported by substantial evidence.

Dated: White Plains, New York
April 22, 1981

Respectfully submitted,

RICHARD S. SCANLAN
Special Counsel for Respondent
(WILLIAM J. TORPY, *Corporation Counsel*)